Dumpar Tinggi Sdn Bhd v Teh Swee Seng & Anor

HIGH COURT (KUALA LUMPUR) — SUIT NO S2-22-477 OF 1995
KAMALANATHAN RATNAM J
16 FEBRUARY 2000

***Contract** — Damages — Breach — Joint venture agreement — Assessment of damages on breach of contract — Actual damages claimed not proved*

The defendants, who were the owners of a piece of land, had entered into a joint venture agreement ('JVA') with the plaintiff to develop the land in a housing area. Pursuant to the JVA, the defendants were required to deposit the issue document of title to the land with a firm of solicitors as stakeholders. Due to the defendants' failure to deliver the issue document of title, the subdivision could not be done and the plaintiff's application to the Ministry of Housing could not be proceeded with. Despite the plaintiff's notices, the defendants failed to deliver the title and consequently, the plaintiff accepted the defendants' repudiation of the JVA and sued the defendants for damages suffered. The court granted judgment for the plaintiff. However, the plaintiff was dissatisfied with the quantum of damages awarded and appealed.

Held, dismissing the appeal:

(1) The plaintiff's claim for fees paid to the relevant authorities, the project coordinator, the project engineer and the surveyor totaling RM175,835.55 were supported by receipts over which there were no disputes. Accordingly, the court had granted the plaintiff judgment for the said sum (see p 732E–G).

(2) The plaintiff had claimed a sum of RM155,000, being the amount paid to the contractor. In support of this claim, the plaintiff had merely referred to the progress claim from the contractor, one Sykt Pembinaan Bersatu Maju (M) Sdn Bhd ('SPBM') addressed to the plaintiff in which SPBM claimed a sum of RM164,340. No evidence was led by the plaintiff as what the bill was actually for. The plaintiff neither called the contractor to testify that the amount claimed had been received by him nor did the plaintiff tender any receipt to show that the sum of RM155,000 had been paid. Furthermore, no explanation was given as to why the amount had been reduced from RM164,340 as stated in the progress claim to RM155,000 as claimed in the statement of claim. As such, the plaintiff's claim for this item failed (see pp 735G–736A).

(3) The claim for the sum of RM300,000 was compensation allegedly paid by the plaintiff to SPBM. The letter relied upon by the plaintiff to substantiate its claim was a letter from SPBM, wherein SPBM stated that as a result of the plaintiff's order to stop work on the housing project, SPBM had incurred loss of profit, overhead costs and costs incurred in mobilization of machinery

amounting to RM350,000. Again, SPBM's receipt was not tendered as evidence and therefore, the plaintiff's claim for this item should not be allowed (see pp 736B–H).

(4) In respect of the alleged loss of profit to not more than RM840,000, other than merely stating this figure, the plaintiff did not lead any evidence and as such, this item did not merit any consideration at all (see p 737A).

[Bahasa Malaysia summary

Defendan-defendan, yang merupakan pemilik sekeping tanah, telah memasuki satu perjanjian bersesama ('PB tersebut') dengan plaintif untuk membangunkan tanah dalam kawasan perumahan. Mengikut PB tersebut, defendan-defendan dikehandaki mendepositkan dokumen hakmilik keluaran tanah tersebut dengan satu firma peguamcara sebagai pemegang amanah harta. Disebabkan kegagalan defendna-defendan untuk menyerahkan dokumen hakmilik keluaran tersebut, pembahagian tidak dapat dilaksanakan dan permohonan plaintif kepada Kementerian Perumahan tidak boleh diteruskan. Meskipun notis-notis plaintif, defendan-defendan gagal untuk menyerahkan hakmilik tersebut dan justeru itu, plaintif telah menerima penolakan defendan-defendan terhadap PB tersebut dan menyaman defendan-defendan untuk ganti rugi yang dialami. Mahkamah memberikan penghakiman kepada plaintif. Namun begitu, plaintif tidak berpuas hati dengan kuantum ganti rugi yang diawardkan dan membuat rayuan.

Diputuskan, menolak rayuan tersebut:

(1) Tuntutan plaintif untuk yuran yang telah dibayar kepada pihak berkuasa yang berkaitan, koordinator projek, jurutera projek dan penilai berjumlah RM175,835.55 telah disokong dengan resit-resit yang tidak dipertikaikan. Sewajarnya, mahkamah telah memberikan plaintif penghakiman untuk jumlah tersebut (lihat ms 735E–G).

(2) Plaintif telah menuntut sejumlah RM155,000, iaitu jumlah yang dibayar kepada kontraktor. Bagi menyokong tuntutan ini, plaitnif hanya merujuk kepada tuntutan pergerakan kerja daripada kontraktor, iaitu Sykt Pembinaan Bersatu Maju (M) Sdn Bhd ('SPBM') yang dialamatkan kepada plaintif di mana SPBM menuntut untuk jumlah RM164,340. Tiada keterangan dikemukakan oleh plaintif untuk apa bil tersebut sebenarnya. Plaintif tidakpun memanggil kontraktor untuk memberikan keterangan bahawa jumlah yang dituntut telah diterima oleh beliau maupun plaintif menenderkan apa-apa resit untuk menunjukkan bahawa jumlah RM155,000 telahpun dibayar. Tambahan pula, tiada penjelasan telah diberikan kenapa jumlah tersebut telah dikurangkan daripada RM164,340 sebagaimana

yang dinyatakan di dalam tuntutan pergerakan kerja kepada RM155,000 sebagaimana yang dituntut dalam pernyataan tuntutan. Oleh itu, tuntutan plaintif untuk item ini gagal (lihat ms 735G–736A).

(3) Tuntutan untuk jumlah RM300,000 untuk pampasan yang didakwa telah dibayar oleh plaintif kepada SPBM. Surat yang plaintif bergantung dengan untuk mengukuhkan tuntutannya adalah sepucuk surat daripada SPBM, di mana SPBM menyatakan bahawa akibat daripada arahan plaintif untuk berhenti kerja projek perumahan tersebut, SPBM telah mengalami kerugian keuntungan, kos-kos belanja overhed dan kos-kos yang dikenakan untuk penggunaan mesin-mesin yang berjumlah RM350,000. Sekali lagi, resit SPBM tidak ditenderkan sebagai keterangan dan oleh itu, tuntutan plaintif untuk item ini tidak sepatutnya dibenarkan (lihat ms 736B–H).

(4) Berhubung dengan kerugian keuntungan yang didakwa yang tidak lebih daripada RM840,000, selain daripada hanya menyatakan jumlah ini, plaintif tidak mengemukakan apa-apa keterangan dan oleh demikian, item ini tidak memeritkan apa-apa pertimbangan apa sekalipun (lihat ms 737A).]

Notes

For cases on damages in breach of contract, see 3(2) *Mallal's Digest* (4th Ed, 2000 Reissue) paras 2445–2455

Legislation referred to

National Land Code 1965 s 244

CK Lee (*Tang & Lee*) for the plaintiff.
YN Ngeow (*Norahayati Deol & Partners*) for the defendants.

Kamalanathan Ratnam J:

Facts

The plaintiff and the defendants agreed on a joint venture to develop three pieces of land measuring 8.67 acres into a housing development (joint venture) of which GM 113, Lot 2463, Mukim Bentung (GM 113) constituted an area of 7 acres. On 29 May 1990 the parties signed the said joint venture agreement (JVA).

The recital to the JVA which described all the joint venture lands did not state that the same were subject to any encumbrances. Further, the second limb of cl 2.2(iv) of the JVA provided that the defendants 'shall deliver the said Land free from encumbrances and with vacant possession to the Developer (plaintiff) for the purposes of development' and under cl 9.1 of the JVA the defendants were to deposit all the documents of titles with Messrs SN Fong as stakeholders upon execution of the JVA, which the

defendants would not have been able to comply with, if the joint venture lands were subject to any charge as the documents of titles of the same would have been deposited with the incumbent chargee under s 244 of the National Land Code 1965.

On 2 October 1990, that is, four months after the JVA had been executed, the defendants created a fourth legal charge over GM 113 in favour of Hongkong and Shanghai Bank ('Hongkong Bank'). This fact, together with the existence of the three previous legal charges to Hongkong Bank was only discovered by way of a land search on GM 113 made on 27 July 1992, which was carried out after the plaintiff had received the notice of termination of the agreement from Messrs S.N. Fong dated 18 July 1992.

The plaintiff then sued the defendants in the Kuantan High Court under Civil Suit No 22–41–92 but with the execution of a supplemental agreement on 12 July 1993 ('supplemental agreement') providing for variations of the JVA, the said suit was withdrawn with no order as to costs pursuant to cl 6 of the said supplemental agreement.

The supplemental agreement further provided, inter alia, that:

(a) under cl 3, the deadline for the joint venture was extended from 28 May 1992 to 12 June 1994;

(b) under cl 4, read together with cll 1 and 7, the defendants were to deposit all land titles with Messrs Zul & Co, advocates and solicitors ('Messrs Zul & Co'), upon execution of the supplemental agreement.

The plaintiff had already made an application on 25 September 1993 to the Ministry of Housing for the developer's licence, which together with the advertisement and sales permit were the last remaining approvals to be obtained. All other approvals had already been obtained earlier.

However, the actual subdivision could not be proceeded with or completed due to the defendants' failure to deliver the title to GM 113 for subdivision process even though Messrs Zul & Co had sent a reminder to the defendants on 27 April 1994 to deliver all the land titles. The application to the Ministry of Housing also could not be proceeded with further due to the defendants' failure to deliver the land titles to enable clear copies to be made in compliance with the request of the Ministry of Housing dated 19 April 1994. Due to the approaching deadline, the plaintiff's then solicitors wrote to the defendants' then solicitors on 10 May 1994 confirming that the defendants were endeavouring to deliver the land titles and the defendants were also put on notice that the plaintiff had spent considerable monies on the development.

Another letter dated 23 May 1994 followed, whereby the plaintiff reminded the defendants of the urgency of the matter and that the plaintiff would have no alternative but to accept the defendants' repudiation and claim for damages suffered if the defendants still could not deliver the land titles by 27 May 1994. On 28 May 1994, the plaintiff accepted the defendants' repudiation of the contract by the defendants' failure to forward the title and filed this suit.

Findings of the court

Having heard all the evidence, I entered judgment for the plaintiff. Only the first defendant testified.

This appeal by the plaintiff is against my award of damages only.

Plaintiff's claim

The plaintiff claimed the following:

(a)	Management and administration expenses for the joint venture development	RM251,416.15
(b)	Amount paid to contractor	RM155,000
(c)	Compensation paid to contractor	RM300,000
(d)	General damages for loss of profit not exceeding	RM840,000
(e)	Costs and interest	

In respect of item (a), the plaintiff had claimed:

(i)	Fees paid to relevant authorities amounting to	RM129,763.55
(ii)	Fees paid to project coordinator	RM18,855
(iii)	Fees paid to project engineer	RM19,535
(iv)	Fees paid to surveyor	RM 7,700
		RM175,853.55

All these figures were supported by receipts over which there were no disputes. In the circumstances, I granted the plaintiff judgment for this sum.

Under items (b) and (c), the plaintiff claimed a sum of RM455,000. In support of (b), the plaintiff merely referred this court to an agreed document found in the common agreed bundle of documents at p 124. This was a progress claim from one Syarikat Pembinaan Bersatu Maju (M) Sdn Bhd and addressed to the plaintiff claiming a sum of RM164,340. No evidence was led as to what this bill was actually for. The plaintiff now expects this court to accept its submission that this document is the basis for it to claim a sum of RM155,000, which it says it has paid the contractor. If this kind of proof is all that the plaintiff can produce to this court, it must fail in its attempt to make this claim. Surely it would have been easy to have called the contractor to prove the actual sum he received, or at least a receipt from the contractor showing receipt of the sum of RM155,000 ought to have been tendered. Besides, no explanation was given why the figure had been reduced from RM164,340 as stated in the document to RM155,000

as claimed in the statement of claim. The shoddy manner in which the plaintiff's claim has been made shows total carelessness in preparation; alternatively, it smacks of an attempt to claim for something not actually paid for. Either way, this claim must fail.

In respect of item (c), that is, the alleged compensation paid to the contractor, the plaintiff referred me to a letter again from the same Syarikat Pembinaan Bersatu Maju (M) Sdn Bhd dated 2 July 1994. It is interesting to reproduce the entire letter which claimed a sum of RM350,000. The said letter reads as follows:

> 2 July 1994
>
> Dumpar Tinggi Sdn Bhd
> A2-16 PJ Industrial Park
> Jalan Kemajuan
> 46200 Petaling Jaya
> Selangor
>
> Dear Sir
>
> Re: Cadangan Perumahan di atas 2463, 1583 dan 1072, Mukim Bentung, Daerah Bentong, Pahang Darul Makmur
>
> We refer to your instruction to stop all our works for the above housing project, we hereby wish to claim for cost of compensation from your goodself on the following reasons:
>
> 1 Loss of profit from the construction of the above housing project;
>
> 2 All overhead cost for estimating, preparation and entertainment;
>
> 3 All cost incurred in mobilisation and demobilisation of our construction plant and machineries.
>
> Our total claim for compensation of the above amounts to Ringgit Malaysia Three Hundred and Fifty Thousand (RM350,000) only.
>
> Your kind consideration on the above is greatly appreciated.
>
> Thank you.
>
> Yours faithfully,
> PEMBINAAN BERSATU MAJU (M) SDN BHD
>
> Sgd
> YEO AN KEE
> Project Director

It is obvious that no breakdown figures have been provided by the contractor, and yet the plaintiff was willing to accept the figure of RM300,000 as compensation. I am surprised that in its submission, the plaintiff says that a sum of RM300,000 has been paid to the contractor. If this were indeed so, there ought to be no reason why the plaintiff could not produce proof of payment through vouchers and also no explanation was given as to why the contractor's receipt was not tendered. Again, I am inclined to hold that no money has indeed been paid. It is because of this total lack of proof that I dismissed these two items claimed.

A As for the alleged loss of profit to not exceeding RM840,000, other than merely stating this figure, the plaintiff led no evidence and hence this item merits no consideration at all.

I therefore awarded the plaintiff the only item it successfully proved, that is, the sum of RM175,853.55. I also awarded interest at 4%pa from the B date of filing of the suit to date of judgment and costs. Costs no doubt to be on the sessions court scale.

Order accordingly.

Reported by Andrew Christopher Simon

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